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Equity--Clean Hands

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lots regarded the restrictive agreement as something which added to the value of their land. *Burges v. City of St. Paul*, 241 Minn. 285, 64 N.W.2d 73 (1954); *City of Shelbyville v. Kilpatrick*, 204 Tenn. 484, 322 S.W.2d 203 (1959).

But other courts have held to the contrary. Restrictive covenants do not rise to the dignity of an estate in the land itself but are contractual rights not binding on the sovereign contemplating a public use of the particular property taken. *Friesen v. City of Glendale*, 209 Cal. 524, 288 Pac. 1080 (1930); *Anderson v. Lynch*, 188 Ga. 154, 3 S.E.2d 85 (1939). In *State v. City of Dunbar*, 142 W. Va. 332, 338, 95 S.E.2d 457, 461 (1956), the court said,

“ . . . those who enter into such covenants do so with the knowledge that the government has the absolute right to acquire lands for governmental purposes, and they can not be presumed to have intended an interference with such right.”

Because of the unique fact situation in the principal case, the court had difficulty in determining whether the covenant was a compensable interest. Three dissenting judges held that the plaintiff did not have a compensable interest on the basis that the covenant was personal and did not run with the land. The Ohio court has held that owners of a restrictive covenant don't have a compensable interest. *Norfolk & W. Ry. v. Gale*, 119 Ohio St. 110, 162 N.E. 385 (1928); *Doan v. Cleveland Short Line Ry.*, 92 Ohio St. 461, 112 N.E. 505 (1915). Thus, the majority in the principal case seem to hold that this covenant created a greater interest in the land than a restrictive covenant.

Ward Day Stone, Jr.

Equity—Clean Hands

Suit to replace a lost deed. In 1934 *A*, the sole stockholder and concededly alter ego of *P* corporation, conveyed property to *B*, his son, without consideration. *B* agreed to hold the property for *A*'s benefit. The purpose of the conveyance was to conceal the property from *A*'s creditors. In 1945 *A* filed a petition in bankruptcy in which he swore that he had no interest in real property. In 1950 *B* at *A*'s request conveyed the property to *D* who was *A*'s son-in-law. This conveyance was without consideration. *A* discharged *B*'s earlier

promise and obtained a similar promise from *D*. *D* conveyed the property to *P* corporation in 1950. The deed was not recorded and was subsequently lost. *P* brought this suit to have the deed replaced. The Supreme Court, Appellate Division, reversed lower court's decision granting relief demanded. *P* appealed. *Held*, reversed. The majority of the court reasoned that the theory of unclean hands was not a bar to relief. The equitable relief sought was not to enforce an executory obligation arising out of an illegal transaction but to protect legal ownership. The wrongs done by *A* prior to acquisition of the title now in issue may not now be raised by *D* to defeat relief. The two dissenting judges were of the opinion that these transactions were a carefully calculated plot on *A*'s part to keep the property within the family and away from creditors. They felt that the doctrine of "unclean hands" was applicable and *A* was not entitled to relief. *Seagirt Realty Corp. v. Chazanof*, 246 N.Y.S.2d 613 (1963).

The doctrine of "clean hands" is of ancient heritage and is one of the fundamental doctrines of equitable jurisprudence. Today, no principle is better settled than the maxim that he who comes into equity must come in with clean hands or be denied relief regardless of the merits of the claim. *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806 (1945); *Liberman v. Liberman*, 142 W. Va. 716, 98 S.E.2d 275 (1957). The maxim is not applied for the benefit of the defendant but is for the protection of the court based on the principle that equity will not be an agent in helping carry out a fraud. Further, the application of the doctrine is not dependent on whether the defendant raises an objection, but can be applied by the court on its own motion. *McCLINTOCK, EQUITY* § 26 (1948). There are, however, certain limitations upon the application of the principle.

In order for the doctrine of "unclean hands" to apply to bar a claim, plaintiff must have committed acts of unconscionable conduct relating to the very activity that is the basis of his claim. Relief will not be refused merely because of plaintiff's general bad character nor because of particular acts of misconduct not directly involved in the suit. *McLaughlin v. McLaughlin*, 187 A.2d 905 (Pa. 1963).

In the case of *White v. Graham*, 112 W. Va. 451, 164 S.E. 664 (1932), *B* and *C* by misrepresentation and fraud convinced *A* to convey his property to them. The property was to be held by them

"to save it" and was to be reconveyed upon *A*'s request. *A* asked for reconveyance of the property. *B* and *C* set up their defense on the basis that the conveyance was made to defraud *A*'s creditors and to show the general bad character of *A*. There was no fraud on creditors. The court held that *A* was entitled to a reconveyance. The "unclean hands" doctrine did not apply because *A*'s fraud did not apply to the transaction in litigation.

The problem often arises in determining whether the "bad" conduct is a part of the "same transaction" which now serves as basis for the claim. The courts are not in agreement on what test should be used. *New York N. H. & H. R. v. Pierce Coach Lines*, 281 Mass. 479, 183 N.E. 836 (1933); *City of Wink v. Griffith Amusement Co.*, 129 Tex. 40, 100 S.W.2d 695 (1936). However, it is recognized that if the plaintiff can prove his case without reference to fraudulent elements in the facts he can have relief. *Zak v. Zak*, 305 Mass. 194, 25 N.E. 2d 169 (1940); *Highland v. Davis*, 119 W. Va. 501, 195 S.E. 604 (1937). In the instant case plaintiff could prove his case without referring to the fraud of 1934. Plaintiff's cause of action arose not because of the fraud, but because the deed was lost.

The dissenting opinions were based on the theory that these transactions were all in a scheme to defraud creditors. Admitting that this is all one transaction and that it was done with the intent to defraud creditors, there is another ground upon which plaintiff is entitled to relief. In the instant case the plaintiff was not relying upon an illegal executory contract but a contract which had been executed. All the courts are in agreement as to the application of the "unclean hands" doctrine where the plaintiff is trying to enforce an illegal executory contract. Thus where *A* transfers property to *B* to defraud his creditors and *B* promises to hold the property for *A* until the trouble has passed, the doctrine is applicable when *A* seeks specific performance of the agreement. *A* is not entitled to force *B* to reconvey the property when the trouble ceases to exist because of the fraud. In this situation *A* would be suing upon the fraudulent executory contract. *Fyffe v. Lyon*, 274 Ky. 399, 118 S.W.2d 745 (1938); *Poling v. Williams*, 55 W. Va. 69, 46 S.E. 604 (1904). Further, equity will leave the parties asserting rights founded upon an illegal contract in the situation in which they have thereby placed themselves and deny relief from or under the contract. *Smith v. Smith*, 255 Wis. 96, 38 N.W.2d 12 (1949). In the instant

case, however, plaintiff was not suing upon the illegal contract but was suing for the replacement of a lost deed.

In *Hertzler v. Geigley*, 196 Pa. 419, 46 Atl. 366 (1900), the court stated that if an illegal agreement has in fact been executed by the parties and the illegal purpose of the contract has been accomplished the court will not invade the transaction to discover its origin. As between fraudulent grantor and fraudulent grantee, title passes and only creditors upon whom the fraud is perpetrated have a right to attack the conveyance to have it set aside. *Solins v. White*, 128 W. Va. 189, 36 S.E.2d 132 (1945). In the principal case the defendant was not a victim of the fraud, and he should not be allowed to point to some prior fraud of plaintiff's as a ground for not making a new deed.

In the instant case the doctrine of "unclean hands" was rightly held inapplicable. The fraud in question did not arise out of the matter in litigation. The plaintiff's cause of action arose out of an occurrence separate and apart from the illegal contract. The plaintiff owned the property absolutely and was not seeking specific performance of a prior agreement. When the defendant delivered the deed to plaintiff in the prior conveyance title passed. The plaintiff was seeking some physical evidence of a title which he already had. The title standing in defendant's name was misleading the public and would continue to mislead them as to the true owner of the property until the record title was corrected.

Fred Adkins

Estate Tax—Marital Deduction Formula Clause

Testator provided by a clause in his will that should his wife survive him, she was to receive a bequest equal to one-half the value of his adjusted gross estate, after deducting all debts, funeral, and administration expenses. His executors deducted the administration expenses on the estate's income tax return, which in turn increased the actual value of the adjusted gross estate for estate tax purposes. Executors computed the wife's share on the basis of the higher adjusted gross estate and accordingly claimed a higher marital deduction in the estate tax return. Commissioner rejected the executor's marital deduction figure and set the amount passing